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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1650

ALBERT OHRALIK,

Appellant,

v.

OHIO STATE BAR ASSOCIATION,

Appellee.

No. 77-56

IN THE MATTER OF EDNA SMITH,

Appellant.

MOTION FOR LEAVE TO FILE
AND
BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN AND THE NATIONAL RESOURCE CENTER FOR CONSUMERS OF LEGAL SERVICES URGING THE COURT TO SET ASIDE THE DISCIPLINARY ORDERS BELOW

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Public Citizen and the National Resource Center for Consumers of Legal Services hereby move the Court for leave to file the accompanying brief *amici curiae* urging the Court to set aside the disciplinary orders entered below in the above-entitled actions.

INTERESTS OF *AMICI*

Amici are two broad based consumer-oriented organizations whose interests will be directly affected by the disposition of the present proceedings. Each *amicus* has a

significant organizational interest in improving the quality, availability and delivery of legal services, and each represents the interests that its individual members and supporters have in obtaining important information about the lawyers who are available to represent them. Moreover, *amici* are the two organizations that this Court granted leave to file a prior *amicus* brief urging plenary consideration of the present appeals in tandem.

Public Citizen is a non-profit organization supported by contributions from approximately 65,000 individuals annually. It engages in a wide variety of activities on behalf of consumers and is particularly concerned about laws and ethical restrictions that govern the price and quality of professional services as well as the dissemination of information about those services, especially as they relate to lawyers. Attorneys for Public Citizen represented the consumer plaintiffs in successful suits challenging the validity of lawyers' minimum fee schedules[1] and challenging the constitutionality of statutory prohibitions on drug price advertising.[2] In addition, Public Citizen has attempted to publish its own consumers' directory of physicians but has been forced by low physician participation to commence litigation challenging on First Amendment grounds the constitutionality of an advertising restriction that prohibits doctors from being listed in such directories.[3] Public Citizen has also submitted *amicus* briefs in the cases of *Jacoby v. State Bar of California*, No. LA 30601 (Cal. Sup. Ct., May 3, 1977),

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[1] *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

[2] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

[3] *Public Citizen v. Commission on Medical Discipline of Maryland*, No. 76-1944 (4th Cir., appeal pending).

and *Bates v. State Bar of Arizona*, 45 U.S.L.W. 4895 (U.S. June 27, 1977), both of which held that consumers have a right of access, protected by the First Amendment, to certain information about attorneys and their practices.

The National Resource Center for Consumers of Legal Services (the "Resource Center") is a non-profit organization funded by foundations and by its members, which include labor unions, cooperatives, credit unions, and other consumer groups. The Resource Center represents more than 27,000,000 individual consumers of legal services throughout the United States. A principal purpose of the Resource Center is to foster the growth and development of legal service delivery plans for low and middle income persons and to provide assistance to individuals and organizations that wish to establish such plans. Because the successful establishment and operation of these plans depends upon the ability of attorneys to disseminate information about their practices to consumers, the Resource Center is committed to improving the flow of such information. The Resource Center also participated *amicus curiae* in the *Jacoby* and *Bates* cases.

The interests presented by *amici* in this case are the interests of consumers in having meaningful access to information enabling them to determine when legal services may be useful, and allowing them to make informed choices among available lawyers and delivery systems. The informational interests of consumers are not identical to the interests of attorneys in disseminating information about their practices, but both interests are similar; consumers cannot secure meaningful access to information about attorneys if the attorneys are prevented from effectively disseminating that information. In fact, Last Term in *Bates*, the

majority opinion "deem[ed] it significant" that consumer organizations supported the elimination of the advertising ban struck down in that case. Slip Op. at 26 n.35, 45 U.S. L.W. at 4902. Consequently, presentation of the consumer interests will assist the Court in making an informed decision concerning the proper disposition of the present appeals.[4]

Respectfully submitted,

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[4]Although *amici* sought the consent of the parties to the filing of this brief, they were able to obtain consents from only three of the four parties involved. Consequently, *amici* have made the present motion.

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INTERESTS OF *AMICI CURIAE*

The interests of amici are set out in the accompanying motion for leave to file this brief *amici curiae.*

INTRODUCTION

Appellants in the two present actions are attorneys who have been disciplined for violating state prohibitions on solicitation which mirrored the prohibitions contained in the American Bar Association's Code of Professional Responsibility. Those provisions not only prohibit attorneys from urging individuals to employ them, but also prohibit attorneys from accepting employment by individuals whom they have advised of their legal rights. Because the effect of those prohibitions is to impede the flow of potentially useful information from lawyers to consumers, the prohibitions must be measured against the standards that this Court has announced in similar kinds of First Amendment cases, most notably *Bates v. State Bar of Arizona*, 45 U.S.L.W. 4895 (U.S. June 27, 1977). Since neither the Ohio nor South Carolina Supreme Courts applied the proper standards or made any findings of a real or potential harm to the public from the conduct for which appellants were disciplined, the decisions below should be set aside.

CONSTITUTIONAL AND ETHICAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

DR 2-103 of the Ohio and South Carolina Codes of Professional Responsibility provides in pertinent part:

> (A) A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.
>
> * * *
>
> (D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:
>
> * * *
>
> (5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:
>
> (a) The primary purposes of such organization do not include the rendition of legal services.
>
> (b) The recommending, furnishing or paying for legal services to its members is incidental and reasonably related to the

primary purposes of such organization.

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

(d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.[1]

* * *

DR 2-104 of the Ohio and South Carolina Codes of Professional Responsibility provides in pertinent part:

> (A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:
>
> (1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

* * *

QUESTION PRESENTED

Can the Bar constitutionally prohibit all solicitation without regard to its consumer benefits, or must it narrowly tailor its rules to prevent the few legitimate dangers that solicitation can involve?

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[1] *See* page 30, note 19, below, concerning the ABA amendment to DR 2-103(D).

STATEMENT OF THE CASES

A. Statement of Facts in No. 76-1650

In No. 76-1650, appellant Ohralik was indefinitely suspended from the practice of law for soliciting two clients in a personal injury case. The Ohio Supreme Court ruled that appellant's actions in securing employment violated DR 2-103(A), which prohibits attorneys from recommending their employment to non-lawyers, and DR 2-104(A), which prohibits attorneys from accepting employment that results from unsolicited advice given to laypersons concerning their legal rights. The record suggests that appellant would not have been retained if he had not initiated the contacts between himself and his clients, and it shows that both clients ultimately became dissatisfied with appellant's representation. However, the record also indicates that in the process of securing employment, appellant informed his clients that they possessed legal rights of which they might not otherwise have been made aware. Moreover, none of the reasons for the clients' ultimate disenchantment are traceable to the fact that it was appellant, rather than the clients, who initiated the contact that resulted in appellant's retention.

Appellant's representation of Carol McClintock, an 18 year old woman, was secured after he visited her in the hospital upon learning that she was injured in an accident while driving her parents' automobile. Appellant, who was already slightly acquainted with Carol, first heard about the accident from the postmaster's brother when he made one of his bi-weekly trips to the post office to pick up his mail. [Tr. 177-80].[2] Shortly thereafter, he called Carol's parents

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[2] "Tr." refers to designated pages of the transcript. Because *amici* have cited portions of the transcript that the parties have not included in the Appendix, page references have been made to the transcript itself. References to pages in the Appendix are followed by "a."

to inquire about her health, and apparently Carol's parents expressed some concern that they might be sued by Wanda Lou Holbert, Carol's passenger at the time of the accident. Mr. Ohralik then went to visit the parents and afterwards went to see Carol herself in the hospital. During his visit with Carol appellant advised her of her legal rights and they discussed the possibility of his retention on a one-third contingent fee basis. He then returned to the McClintock's home and was told that Carol had called to request him to represent her. Mr. Ohralik consented and began to discuss the accident with the McClintocks. [Tr. 180-90].

During his discussion with the McClintocks appellant assured them that they did not need to worry about being sued by Carol's passenger because Ohio had a guest statute which prohibited such suits. He also explained the operation and underlying theory of the guest statute, and explained other theories of liability that could supersede it, but advised the McClintocks that in their case they had little to fear. In addition, appellant explained the uninsured motorist coverage of the McClintocks' policy and informed them that Carol could be compensated for her injuries even though the driver who caused the accident had no liability insurance. He also explained how the negotiation and settlement process generally worked in personal injury cases. [Tr. 167, 182, 234, and 96a-105a].[3]

Mr. Ohralik next went to visit Wanda Lou Holbert, the passenger in Carol's car who had also been injured in the accident. Wanda had just returned home after being released from the hospital, and appellant stated that he was calling on her as a witness to the accident. Shortly after their conversation began, however, appellant volunteered that he

[3]Appellant made a tape recording of this conversation. The actual tape is in the record, and a transcript is reproduced in the Appendix.

was already representing Carol and offered to represent Wanda as well on a one-third contingent fee basis. Wanda said, "O.K.," and they then discussed the circumstances surrounding the accident. During this discussion, appellant explained the nature of the claims that Wanda had against the McClintocks' insurance company, he explained her obligations under their contingent-fee arrangement, and he cautioned her against speaking to insurance adjusters, frequently emphasizing that she was now represented by a lawyer. [118a-130a].[4]

The following day, February 14, 1974, appellant received a telephone call from Wanda's mother, during which she attempted to discharge him. Appellant, however, asserted that he was representing Wanda, an 18 year old, legally competent adult, and that Wanda's mother could not effectively discharge him. After this conversation appellant took no action to confirm his retention by Wanda but rather continued to assert claims on her behalf against the insurance company. Similarly, Wanda took no action to confirm her mother's attempted discharge. It was not until one month later, on March 14, 1974, that Wanda finally wrote a one sentence letter to appellant discharging him, apparently because of her feeling that there had been undue delay in her receipt of benefits from the insurance company. [Tr. 32, 63-65]. In addition, Wanda filed a grievance complaint against Mr. Ohralik.

In the meantime, Carol had also become dissatisfied with Mr. Ohralik's representation and wished to replace him with another attorney. She too stated that this was because of delay in receiving any payments from the insurance company, and because of what she stated was in-

[4]Appellant also tape recorded his conversation with Wanda.

sensitivity and neglectful representation on the part of appellant. [Tr. 97-99, 118, 197]. In Carol's case, however, appellant eventually obtained an agreement from the insurance company to pay her $12,500, the maximum amount available under the policy, but Carol refused to accept the money and refused to pay appellant the $4,166.66 he claimed as a contingent fee. Appellant then sued Carol to collect his fee, and Carol hired a second attorney to defend that suit. Ultimately, the suit was settled, and Carol paid appellant the full fee that he had demanded. She also paid her second attorney a $900 fee. [Tr. 118–19, 133–34, 138, 140–41]. As a result of her dissatisfaction with appellant's representation, Carol also filed a grievance complaint against appellant.

The complaints made by Wanda and Carol prompted the Ohio State Bar Association to request the initiation of formal grievance proceedings against appellant charging him with violating the two prohibitions on solicitation contained in DR 2-103(A) and DR 2-104(A). After conducting an evidentiary hearing, a three-member Panel of the Board of Commissioners on Grievances and Discipline found that appellant had unethically solicited Wanda and Carol in violation of those two code provisions, and recommended that he be given a public reprimand. Appellant had argued that the two ethical provisions under which he was charged were invalid because they unconstitutionally deprived him of his First Amendment right of Free Speech, but the Panel rejected this argument, devoting only a single sentence to it. On appeal, the Ohio Supreme Court upheld the Panel's ruling but, without explanation, increased appellant's punishment to indefinite suspension from practice and taxed $1797.28 in costs against him. The Ohio Supreme Court also summarily rejected appellant's First Amendment claim, again disposing of it in a single sentence. The present appeal to this Court followed.

Several features of these facts are significant. First, in the process of promoting his own services, appellant conveyed valuable information to many people concerning their legal rights. He not only advised Carol and Wanda that they had viable claims for damages even though the drunk driver who caused their accident had no liability insurance, but he also informed them that those claims could be asserted on a contingent-fee basis, entailing no risk of financial loss to them. These are facts of which Carol and Wanda were apparently unaware. In addition, appellant relieved Carol's parents' apprehensions concerning a potential suit against them by Wanda. [Tr. 167, 182, 234]. All of this information was provided free of charge, but it is unrealistic to think that appellant would have conveyed this information in the absence of the hope of future financial gain.

Another feature worth emphasizing is that although appellant's contacts with Carol and Wanda took place shortly after an accident, under circumstances that have traditionally been viewed as particularly fraught with the dangers of duress and overreaching, there is no evidence that either woman was unable to make a reasoned decision at the time that appellant was retained, and the disciplinary tribunals made no such findings. Moreover, the difficulties that developed later between appellant and his clients did not stem from the context in which they were approached or even from the fact that appellant initiated the contact. Rather, those difficulties, relating to the quality of appellant's representation, arose later when Carol and Wanda were no longer in particularly vulnerable positions.

B. Statement of Facts in No. 77-56

In No. 77-56, appellant Smith was publicly reprimanded for solicitation in violation of DR 2-103(D), which prohibits attorneys from assisting an organization to promote the use of their services if the organization recommends, furnishes, or pays for legal services, and DR 2-104(A) which prohibits attorneys from accepting employment that results from unsolicited legal advice that they have given to lay persons. The South Carolina Supreme Court ruled that appellant violated those provisions by informing a group of involuntarily sterilized welfare mothers that they could sue their doctors for damages, and then, in a subsequent letter, offering the services of the ACLU to represent one of those women on a *pro bono* basis. The record does not contain any indication that the welfare mothers were harmed by appellant's actions, and no such finding was made by the disciplinary tribunals. On the contrary, the record establishes that appellant informed those women about legal rights of which they would otheriwse have remained unaware.

The events leading to appellants' discipline began in the Summer of 1973 when the national press reported that indigent black women in Aiken County, South Carolina were being forced to submit to sterilization as a condition of receiving Medicaid benefits. Gary Allen, who was active in Aiken community affairs and who knew women who had been involuntarily sterilized, contacted the South Carolina Council on Human Rights requesting advice and assistance for the welfare mothers [Tr. 151]. In response, the Council decided to send appellant Smith, its legal consultant, to Aiken to speak to three welfare mothers that Mr. Allen had assembled. [Tr. 59-60, 90, 93-94].

Ms. Smith was particularly well suited for the task. She is a black woman attorney who graduated from the University of South Carolina law school and was admitted to practice in 1972. Although she was only 29 at the time of the Aiken meeting, she had already accumulated years of community service through her active involvement in civil liberties and human rights organizations while working her way through school. In addition to being a past Executive Secretary of the Council on Human Rights, and Chairperson of its student chapter while in college, Ms. Smith had also participated in a variety of voter registration, literacy, and day care programs, and has been on the faculty of three different universities in South Carolina, teaching constitutional and consumer law. At the time of the Aiken meeting appellant was not only legal consultant for the Council on Human Rights, but was an officer and member of the Board of Directors of the South Carolina Chapter of the ACLU, as well as an ACLU cooperating attorney. [Tr. 55-59, 75].

The Aiken meeting was scheduled by Mr. Allen for July, 1973. At that meeting appellant informed the welfare mothers that they could not legally be forced to choose between sterilization and loss of Medicaid benefits. She also informed them that they had a right to sue their doctors for money damages if sterilization operations had been performed on them as a result of such coercion. No arrangements to file any lawsuits were made at that meeting, however.

Shortly after the Aiken meeting was held, Mr. Allen wrote to Ms. Smith stating that Marietta Williams, one of the women who had attended, wished to file suit against her doctor.[5] By this time, the National ACLU had also

[5] There is conflicting testimony concerning whether Mrs. Williams ever told Mr. Allen that she wanted to file suit, but it is undisputed that this is what Mr. Allen reported to appellant.

become very interested in the problem of coerced sterilization and had communicated to appellant its desire to offer assistance. Consequently, on August 30, 1973, appellant wrote to Mrs. Williams, informing her that the ACLU had already agreed to represent another Aiken welfare mother in a suit against her doctor for involuntary sterilization and would like to represent Mrs. Williams also if she were interested in filing suit.[6]

Shortly after receiving the letter from appellant, Mrs. Williams took her child to the office of Dr. Pierce, the doctor who had performed her sterilization operation. For reasons that are not disclosed in the record, the doctor's lawyer was also present in the office at the time of this visit. Moreover, Mrs. Williams had taken appellant's letter with her to Dr. Pierce's office. During the meeting that followed, Mrs. Williams gave the letter to the lawyer, signed a form waiving any liability that Dr. Pierce might have for performing the sterilization operation, and then telephoned appellant from the doctor's office informing her that she did not wish to file suit against her doctor. [*See* Tr. 21–24].[7] Appellant did not contact Mrs. Williams again, Mrs. Williams never sued her doctor, and appellant never represented Mrs. Williams in any capacity. Subsequently, two other women did file suit against Dr. Pierce for coerced sterilization, *Doe v. Pierce,* No. 74–475 (D.S.C. 1974), but neither of these women were ever contacted or represented by appellant.

Mrs. Williams never filed a complaint with the Bar, the Attorney General, or anyone else concerning appellant's actions. However, Dr. Pierce's lawyer did file a complaint after he unsuccessfully attempted to use appellant's August 30, 1973 letter to Mrs. Williams in support of his claim

[6]This letter is reproduced at page 25a of appellant's Jurisdictional Statement. *See also* Tr. 18, 83, 152–53.

that *Doe v. Pierce* should be dismissed on grounds that the plaintiffs had been solicited. [*See* Tr. 21-24, 161-62, 164, 168]. As a result, on October 10, 1974, the Board of Commissioners On Grievances And Discipline charged Ms. Smith with solicitation in violation of unspecified provisions of the Canons of Ethics as a result of her August 30 letter.[7]

After an evidentiary hearing, a three-member Panel of the Commission On Grievances And Discipline found that, while there was no evidence establishing that appellant had solicited Mrs. Williams for her own benefit, she was guilty of soliciting Mrs. Williams on behalf of the ACLU – an organization that would benefit financially if the suit were successful and the Court were to award attorney's fees. The Panel ruled that appellant had violated DR 2-103(D) and DR 2-104(A), but recommended only a private reprimand after finding that appellant's activities were neither aggravated nor widespread. The Panel considered and rejected appellant's claim that her actions were protected by the First Amendment. On appeal, the South Carolina Supreme Court upheld the Panel's ruling but increased appellant's punishment to a public reprimand, rejecting the Panel's finding that the circumstances were not aggravated. No reason was given for the rejection of this finding, and all of the Panel's other findings were upheld. In fact, all but a few paragraphs of its opinion were quoted directly from the Panel Report, including the Panel's analysis of the First Amendment issues. The present appeal followed.

The facts of this appeal illustrate several considerations that are central to the issue of solicitation. First, appellant not only communicated to Mrs. Williams information

[7]The complaint is reproduced at page 23a of appellant's Jurisdictional Statement.

about legal rights of which she was unaware, but informed her that an attorney was available to assert her claims free of charge. [Tr. 6–7, 34, 39, 77, 79, 102, 106]. Because of Mrs. Williams' limited education and social circumstances, it is reasonable to conclude that she would never have learned about her legal rights if someone had not first approached her since it is unlikely that she would ever have consulted an attorney on her own. Moreover, information concerning the availability of a free attorney was especially valuable in this case where unpopular and politically controversial issues were involved, since available attorneys are likely to be difficult to find in such cases.

It is also significant that appellant offered the services of the ACLU without any hope of personal financial gain. Although there was a possibility that the ACLU would recover court-awarded attorneys' fees, there is no evidence whatsoever to suggest that financial considerations in any way motivated the ACLU's actions or those of appellant. Rather, appellant's background strongly suggests that she was motivated solely by a genuine desire to assist those whose interests were not adequately represented.[8]

The facts of this appeal also highlight the tendency of vague and broad disciplinary rules to be used for improper purposes. Even though Mrs. Williams had not complained about appellant's actions, Dr. Pierce's attorney apparently tried to use the suggestion of ethical violations to secure

[8] Appellant was not compensated for any of her ACLU activities, [Tr. 59], and even if she had ultimately represented Mrs. Williams herself, she could not have benefitted financially. Under the policy in effect at all times pertinent to this appeal, ACLU cooperating attorneys did not keep court-awarded attorneys fees. Those fees went to the ACLU Foundation to pay expenses and salaries of national and regional ACLU staff attorneys. [Tr. 103, 141]. Under a newly instituted policy, however, in some cases cooperating attorneys now retain court-awarded attorneys fees.

dismissal of *Doe v. Pierce* and, when that failed, to retaliate against appellant. [Tr. 21–24, 161–62, 164, 168].[9] Moreover, the fact that appellant's case is only the fourth reported disciplinary proceeding for solicitation in the entire history of the State of South Carolina strongly suggests that her solicitation proceedings had been instituted in a discriminatory manner. Despite the injustice and chilling effect that such use of the solicitation rules would have, the Panel did not make any findings in this regard and did not even allow appellant to introduce evidence of bad faith or retaliation. [*Id.*].

There are many other instances in which the Panel not only failed to make findings, but totally excluded evidence that appellant wished to introduce concerning consumer interests. For example, the Panel refused to hear evidence relating to whether indigents and minority individuals were frequently ignorant of their legal rights, even when this was offered to show the non-financial nature of appellant's motives. [Tr. 70–72]. The Panel also excluded evidence showing the difficulty that such individuals have in obtaining lawyers – especially for unpopular cases. [Tr. 125, 149–50]. Moreover, the Panel did not allow appellant to introduce evidence concerning the ACLU's commitment to informing unsophisticated clients about their legal rights and providing them with attorneys. Nor did it allow evidence showing that it is frequently necessary for the ACLU to initiate client contact in order to pursue its objectives effectively. [Tr. 123–25, 143–44]. Finally, the Panel did not even permit appellant to introduce evidence supporting her claim that institution of disciplinary proceedings against her under the facts of this case would deter other attor-

[9] If anyone should be disciplined as a result of the events in this case, Dr. Pierce's lawyer is the prime candidate.

neys from accepting controversial or unpopular cases. [Tr. 125-27, 128-29].

SUMMARY OF ARGUMENT

The provisions of the Code of Professional Responsibility which prohibit virtually all solicitation by attorneys unnecessarily deprive consumers of information concerning their legal rights and violate the First Amendment. Solicitation rules are intended to protect the interests of consumers, but because the present rules prohibit all solicitations rather than distinguishing between helpful and harmful solicitations, they do consumers a disservice. The present rules are not only capable of producing absurd results, but they are inconsistent with many other Code provisions. Moreover, because those rules are dangerously vague and overbroad, they have a substantial *in terrorem* effect. Consequently, the present solicitation rules are in serious need of substantial modification.

Because solicitation involves the communication of potentially useful information to consumers, First Amendment protections apply to solicitation. Last term's decision in *Bates v. State Bar of Arizona, supra,* indicates that neither the commercial nature of some solicitations, nor the fact that the legal profession is involved eliminates these First Amendment protections. Since the First Amendment applies, the solicitation rules can be upheld only if they are shown to be the least restrictive means of achieving a compelling state interest, and the state's interest in prohibiting solicitation is shown to outweigh the consumer benefits. *NAACP v. Button,* 371 U.S. 415, 438-39 (1963); *Lamont v. Postmaster General,* 381 U.S. 301, 308-09 (1965); *Dunn v. Blumstein,* 405 U.S. 330, 342-43 (1972); *Shelton v. Tucker,* 364 U.S. 479,

488-90 (1960); *Talley v. California,* 362 U.S. 60, 62-64 (1960); *Broadrick v. Oklahoma,* 413 U.S. 601, 611-12 (1973).

While there are many important consumer benefits to be obtained from solicitation, the justifications traditionally offered to support banning solicitations are without merit, and most have already been rejected by this Court in *Bates.* Moreover, the one danger to which solicitation rules may properly be directed—the danger of undue influence—can be prevented by alternatives which are less restrictive than a total prohibition and which preserve the informational value of solicitation. Consequently, the present solicitation rules violate the First Amendment.

Applying these standards to the cases before this Court, the particular conduct of appellant Smith is not commercial in nature and is, therefore, entitled to full First Amendment protection under *NAACP v. Button, supra.* Although appellant Ohralik's conduct constituted commercial speech, it is still protected by the First Amendment because it did not pose any of the legitimate evils underlying solicitation rules. Therefore, the disciplinary orders entered against each appellant should be set aside.[10]

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[10]The records of both appeals suggest that serious due process problems exist concerning the disciplinary procedures to which each appellant was subjected. *Amici* have not addressed those due process questions because their primary interest concerns the constitutionality of the solicitation rules under the First Amendment. *Amici* assume that the parties will discuss the due process issues, and do not by their silence intend to suggest that due process requirements were met.

ARGUMENT

I. THE PRESENT SOLICITATION RULES ARE ARE SERIOUSLY IN NEED OF MODIFICATION.

The provisions of Canon 2 of the ABA Code of Professional Responsibility now prohibit virtually all solicitation of clients by lawyers. However, not all communications termed "solicitation" are harmful; often solicitation results in the flow of valuable information from lawyers to consumers concerning both their legal rights *and* the availability of attorneys willing to assert those rights. Nevertheless, the ABA rules make no attempt to distinguish between useful and harmful solicitations. Moreover, since those rules have been adopted by nearly every state, the degree to which they can suppress the flow of useful information is enormous. Consequently, the current rules concerning solicitation are in serious need of substantial modification.

The need for a new approach to solicitation is easily documented. Imagine the following scene. A woman enters a municipal courts building, holding her young son by the hand. She speaks almost no English. She is intimidated and frightened by the imposing surroundings. She does not want to be there, but she has received a summons requiring her to appear somewhere in that building because her landlord is trying to evict her and her family. On the verge of despair, she is approached by a smiling young man who asks her in her own language whether there is anything that he can do to help. After hearing about her predicament, the young man takes her to his employer, a lawyer, who accompanies her to court, prevents the eviction, and accepts a modest fee. The woman is, of course, very appreciative, but the bar is not. A grievance complaint is issued and the lawyer is disciplined for solicitation. This is essentially what happened in *In Re Solomon Cohn*, and from the standpoint of consumer

interests, the result is absurd. Solicitation rules that cannot distinguish between the *Cohn* case and a case involving genuine abuses are in serious disrepair and in bad need of major modifications.[11]

The present solicitation rules are also inconsistent with many other Code provisions. For example, a lawyer has an important duty to assist the legal profession in making legal counsel available. This is because

> [t]he need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available. EC 2-1 [footnotes omitted].

Consequently, the Code directs lawyers to "assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed." EC 2-2 [footnote omitted].

The Code also admonishes lawyers to charge a reasonable fee to those who can afford to pay since "[t]he legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate

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[11] This case is reported in the *New York Law Journal*, Feb. 19, 1974, p. 2, cols. 6-7, and is discussed by Professor Monroe H. Freedman in his book *Lawyers' Ethics In An Adversary System*, Ch. 10, Bobbs-Merrill (1975).

compensation for services rendered." EC 2-16.[12] But when a client is impecunious, "[t]he rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer." EC 2-25. Lawyers also have a special obligation to represent clients asserting unpopular or controversial causes. EC 2-27. Finally, it is every lawyer's duty to help improve the legal system so that it "commands public respect and fosters the use of legal remedies to achieve redress of grievances." EC 8-1. *See also* EC 8-2 and EC 8-3.

The irony in all of this is striking. Lawyers have independent obligations to make legal services available, to inform lay persons of their legal rights, to charge an adequate fee or provide free representation to indigents, and to foster the use of legal remedies, but when they are all added together, they total solicitation – a prohibited activity. Such a calculus is difficult to justify. If fulfilling one of a lawyer's obligations is good, then fulfilling all of them ought to be even better.

An additional defect in the ABA's approach to solicitation lies in its undue focus on motivation. The Code allows certain communications to be made to potential clients only if they are not motivated by the hope of financial gain. *See* EC 2-3 and EC 2-4. Financial motivation, however, does not render a communication *per se* useless or harmful as the ABA would have us believe. On the contrary, under our free enterprise system, the profit motive is not only acceptable but is frequently cited as the cause of quality goods and services that have led to our high standard of living. Indeed, many attorneys probably

[12] The legal profession seems to have taken this obligation quite seriously. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

entered the legal profession at least in part because it is a lucrative one, but no one has suggested that this makes the quality of their services suspect. *See Bates v. Arizona State Bar, supra,* slip op. at 20, 45 U.S.L.W. at 4900-01. In fact, it is reasonable to conclude that the flow of valuable information to legal consumers will actually increase if lawyers are permitted to benefit financially from such communications.[13]

Solicitation rules are intended to benefit consumers of legal services. They are not designed to serve the economic interests of lawyers, nor are they meant to provide ammunition for disciplinary tribunals desiring to discourage unpopular litigation. However, as these appeals illustrate, the organized bar has lost sight of the primacy of consumer interests. Consequently, the Court should use this opportunity to reevaluate the legal profession's entire approach to solicitation, and in so doing should give foremost consideration to the interests of consumers.

[13] Although financial motivation seems central to the general ban on solicitation, the *Smith* case shows that the breadth and vagueness of solicitation rules allow them to be used even where free legal services are offered to indigents with important constitutional claims, and to be used in a highly arbitrary manner that makes them likely candidates for abuse.

II. THE SOLICITATION RULES UNDER WHICH APPELLANTS WERE DISCIPLINED VIOLATE THE FIRST AMENDMENT.

A. First Amendment Protections Apply To Communications That Are Now Prohibited.

Because solicitation involves the communication of information, First Amendment protections apply. *See Bates v. State Bar of Arizona, supra.* When lawyers advise potential clients of their rights and offer their services, they are, of course, engaged in speech. Moreover, when consumers listen, they are receiving information from a willing speaker. Because the First Amendment was intended to foster communication – which requires both the dissemination and receipt of information – the right to receive has repeatedly been recognized by this Court as a First Amendment right existing independently of the rights of the speaker. *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Lamont v. Postmaster General, supra*, 381 U.S. at 307; *Martin v. Struthers*, 319 U.S. 141, 143 (1943). Consequently, even if an attorney's interest in soliciting were unable to survive First Amendment scrutiny, the interest of consumers alone in receiving the information conveyed through solicitation would entitle solicitation to protection. *Compare Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra*, with *Patterson Drug Company v. Kingery*, 305 F. Supp. 831, 825 (W.D. Va. 1969) (three-judge court). Of course, as this Court has recognized, the most sensible approach is to consider all of the First Amendment interests involved rather than isolating them, because the First Amendment's function is to protect the free flow of information from speaker to recipient. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra*, 425 U.S. at 756-57.

It can no longer be tenably asserted that the commercial nature of some solicitation deprives it of First Amendment protections. The Court rejected a *per se* commercial speech exception to the First Amendment in the *Pharmacy* case, 425 U.S. at 761-70, and reaffirmed that holding with respect to the legal profession in *Bates*, stating that the result flowed *a fortiori* from the *Pharmacy* opinion. Slip op. at 13-14, 45 U.S.L.W. at 4898-99. Likewise, the conclusion that solicitation rules merit First Amendment protections may be said to flow *a fortiori* from the *Bates* decision. The similarities between the advertising involved in that case and the solicitation involved in the present cases are strong. All three cases involve suppression of information that is potentially very useful to consumers. Moreover, they all adopt the paternalistic approach toward the public that was so forcefully rejected in *Bates*:

> [W]e observed that "on close inspection it is seen that the State's protectiveness of its citizens rests in large part on the advantages of their being kept in ignorance." *Id.*, at 769. But we noted the presence of a potent alternative to this "highly paternalistic" approach: "That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.*, at 770. The choice between the dangers of suppressing information and the dangers arising from its free flow was seen as precisely the choice "that the First Amendment makes for us." *Ibid.* See also *Linmark Associates, Inc. v. Willingboro*, [431] U.S. [85,

97] (1977). [Slip op. at 13, 45 U.S.L.W. at 4899, *quoting Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra*].

Further, all three prohibitions are based on similar illogical assumptions. As Mr. Justice Blackmun stated in *Bates*, "[i]f the commercial basis of the [lawyer-client] relationship is to be promptly disclosed on ethical grounds, once the client is in the office, it seems inconsistent to condemn the candid revelation of the same information before he arrives at that office." Slip op. at 17, 45 U.S. L.W. at 4900. Similarly, if a lawyer may advise clients about their legal rights when clients initiate the contact, it is difficult to see why communication about the very same rights is prohibited simply because a lawyer initiated the contact rather than a potential client.[14]

Because the First Amendment applies, solicitation rules must be strictly scrutinized, and they can be upheld only if certain demanding tests are met. Traditionally, where First Amendment rights are involved, state modes of regulation can be sustained only if they are shown to further a compelling state interest, and to be narrowly drawn so as to entail the least possible intrusion on protected activities. *NAACP v. Button, supra*, 371 U.S. at 438-39; *Lamont v. Postmaster General, supra*, 381 U.S. at 308-09; *Dunn v.*

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[14] As if to emphasize the similarities between *Bates* and the present case, appellee Ohio State Bar Association relies on an old Fourteenth Amendment due process case to justify its ban on solicitation, just as the Arizona State Bar relied on Fourteenth Amendment due process cases to justify its ban on advertising. *See* page 5 of the Ohio Bar Association's Motion To Dismiss. This reliance, of course, proved to be misplaced. *See, Bates v. Arizona State Bar*, slip op. at 5-7, 45 U.S.L.W. at 4897.

Blumstein, supra, 405 U.S. at 342-43; *Shelton v. Tucker, supra*, 364 U.S. at 488-90; *Talley v. California, supra*, 362 U.S. at 62-64; *Broadrick v. Oklahoma, supra*, 413 U.S. at 611-12. *Cf. United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). In *Bates*, the Court suggested that these protections might be somewhat limited because of the commercial nature of the underlying transaction, but the test is still a strict one.[15] Finally, because the First Amendment is involved, any proffered justifications for solicitation should be rooted in actual evidence rather than theoretical speculation.

Although the term "solicitation" conjures up specters of ambulance chasing and prowling the hospital wards, the strong emotional reactions that are often evoked by the term should not be allowed to obscure the analysis necessary to ensure that First Amendment rights are given adequate protection.

> The Court has stated that "a State cannot foreclose the excercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. at 429 . . . . Regardless of the particular label asserted by the State – whether it calls speech "commercial" or "commercial advertising" or "solicitation" – a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly

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[15] Appellant *Smith*, and all other attorneys who are motivated by non-financial rewards, can hardly be accused of commercial solicitation and, therefore, should be entitled to full First Amendment protections.

served by the regulation. [*Bigelow v. Virginia*, 421 U.S. 809, 826 (1975)].[16]

Inquiry must, therefore, be made into the justification for the present solicitation rules to see if they bear a sufficient relationship to a legitimate state interest to withstand First Amendment scrutiny. In conducting this inquiry, the objective should be to maximize the flow of valuable information to consumers while minimizing any incidental dangers.

B. Consumers Have A Substantial Interest In Receiving Information Concerning Their Particular Legal Rights That Greatly Outweighs Any Interest That The Bar Has In Suppressing All Solicitations.

Bates held that the benefits of lawyer advertising to consumers outweighed the potential harms cited by the organized bar to justify a total ban on advertising. As shown below, the benefits to be derived from solicitation may be even greater than the benefits of advertising, and many of the danger are not as serious. Consequently, in many respects, the First Amendment case for solicitation is even stronger than the case for advertising.

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[16] Indeed, advertising and solicitation can be so closely related that it may be difficult to distinguish between the two. For example, if an attorney specializing in probate work sent a copy of a previously-run newspaper advertisment to the families of individuals listed in the obituary column of the newspaper, would that be advertising or solicitation? Regardless of how it is classified, the validity of that conduct should not be determined by the label applied to it.

While advertising can provide consumers with generalized information about legal services, as well as standardized price information, the information conveyed through solicitation can be much more useful since potential clients are given information about their specific legal rights in particular cases. In addition, the potential clients learn about attorneys willing to handle their particular cases at a specified fee tailored to their cases. This is precisely what happened in *Ohralik*. The two clients were advised of their rights arising out of a specific accident, and they learned that at least one attorney was willing to represent them on a contingent-fee basis involving no financial risk to themselves.

Solicitation can also provide economic benefits to consumers. Appellant Ohralik, for example, might well have charged each of his clients less than his full fee since much of the work he did might have been useful in both cases. This is much more likely to happen if lawyers are permitted to solicit multiple clients with closely related legal claims.[17] Moreover, if lawyers were permitted to solicit, competition and its beneficial effects on the cost and quality of service would be enhanced. Perhaps Carol and Wanda had such strong claims that another attorney would have offered a one-fourth contingent fee if he or she had been permitted to compete by soliciting. If solicitation were permitted, there would be a strong incentive for lawyers to increase the quality of their representation and to reduce their fees.

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[17] Indeed, the failure to charge a reduced fee in such a situation might well constitute a violation of DR 2-106 which prohibits an attorney from collecting an excessive fee. Of course, multiple representation would also be governed by the conflict-of-interest provisions of Canon 5.

The one danger that troubled Chief Justice Burger and Justices Powell and Stewart in *Bates* is entirely absent in the context of solicitation. They believed that the advertising of standardized fees for legal services was likely to be misleading – even inherently misleading – because fees must be set for every case individually. When attorneys solicit, however, the legal advice that they offer, including the communication of fee information, is rooted in a particular case, and, therefore, the dangers of consumers being misled are greatly reduced. It should also be noted that while advertising can potentially increase the costs of legal services by increasing a lawyer's overhead, solicitation does not entail such increased expenditures. Consequently, fees are less likely to be increased as a result of solicitation than as a result of advertising.

The *Smith* case illustrates a different, and perhaps more compelling interest that can be served by solicitation. There, Mrs. Williams, an indigent, uneducated, black welfare mother was informed about her constitutional rights as a result of appellant's "solicitation" of her. By interfering with that communication, the State of South Carolina not only interfered with the right to disseminate and receive information, but in a very real sense it interfered with Mrs. William's First Amendment right to petition the courts to redress her grievances since it is unrealistic to think that she would ever have consulted an attorney on her own. Moreover, both appellant Smith and the ACLU are demonstrably committed to the advancement of human rights and civil liberties. By approaching Mrs. Williams they too were attempting to advance their causes through access to the courts, a well recognized First Amendment activity. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *United Transportation Union v. State Bar of Michigan*, 401 U.S.

576, 585 (1971); *United Mine Workers v. Illinois Bar Ass'n.*, 389 U.S. 217 (1967); *Brotherhood of R. Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button, supra.*[18] In addition, society in general is benefitted from the broad remedial effects of successful test case litigation involving important constitutional rights such as that contemplated by appellant Smith.

Relaxation of solicitation restrictions would also benefit consumers by allowing free development of alternative legal services delivery mechanisms. DR 2-103(D), one of the provisions that appellant Smith was found to have violated, broadly prohibits attorneys from assisting organizations to promote the use of their services. Although some exceptions are specified, the prohibition still explicitly applies to organizations whose primary purpose is the rendition of legal services, or who derive financial gain from rendering such services. DR 2-103(D)(5)(a)-(d). By its terms, this provision prohibits attorneys from joining together to establish a legal clinic or any other type of innovative law office that simply advertises its existence, since they would be cooperating with a non-qualifying organization. This provision would also prohibit attorneys from publicly offering prepaid legal service plans, even though such plans may well be essential to adequately meet the legal needs of the public. In fact, the very activity found by this Court to be protected in *Bates* is prohibited by DR 2-103(D). Therefore, unrestrained Bar manipulation of solicitation rules could have the effect of taking back many

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[18] The activities of appellant Smith vis-a-vis the ACLU are very similar to the "solicitation" upheld by this Court in *Button*. As she urgeda in her Jurisdictional Statement, that case certainly appears to control the outcome in her appeal.

of the benefits that this Court gave to consumers in *Bates*, especially with respect to the development of alternative legal service delivery systems.[19]

Against these benefits, the justifications that are traditionally offered to support solicitation prohibitions are woefully inadequate, and most are not even properly cognizable. The most frequently offered justification is that solicitation is improper because it undermines the dignity of the legal profession. This emotional, non-analytical assertion is steeped in rhetoric and tradition rather than based on a genuine concern for the legitimate needs of the public. Moreover, as the Court recognized in *Bates*, an argument based on "dignity" is itself misleading because it seeks to mask the fact that lawyers are motivated by financial incentives like other business men and women. Slip op. at 16-20, 45 U.S.L.W. at 4900-01. It has also been argued that solicitation prohibitions are justified because they prevent litigation that would not otherwise be commenced. The presumption that litigation is somehow bad in and of itself, however, is inconsistent with the many cases that have found litigation to be a form of expression and an exercise of the right to petition protected by the First Amendment. *See* pages 28-29, above. Consequently, this Court also rejected that offered justification in *Bates*. Slip op. at 23-25, 45 U.S.L.W. at 4900-01

The justification that solicitation prohibitions prevent client stealing is also inadequate. This is a justification furthering the economic interests of lawyers at the expense

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[19] One of the reasons that this provision is so broad is that it uses the terms "assisting to promote" and "cooperate with" as if they were synonymous. The language of this section has now been amended in the ABA Code. However, even under the new language, all of the actions described herein would still be prohibited.

of competitive benefits to consumers. As *amici* have repeatedly emphasized, solicitation rules are for the protection of consumers not lawyers – and consumer interests should be given primary consideration in determining their validity. Solicitation rules are also unable to be justified by the assertion that they help to prevent abuses that can occur when lawyers meet with clients behind closed doors. They simply are not directed at such abuses which can occur independently of who initiates the contact.

Finally, the claim that a total prohibition on all solicitation is necessary because of the difficulties of application to individual cases cannot suffice. This justification not only makes the rules amenable to abuse, as the *Smith* case demonstrates, but it flies directly in the face of the First Amendment's least restrictive alternative requirement. Moreover, the Bar's argument that wide latitude is necessary to prevent unsophisticated consumers of legal services from being abused by lawyers is inconsistent with its "professionalism" justification. The Bar may portray attorneys as pillars of virtue and altruism, or as scoundrels ready to pounce on unsuspecting members of the public, but not both. This Court pointed out that contradiction in *Bates* when it rejected the difficulties-of-enforcement justification, and that contradiction is equally present in the solicitation context as well. Slip op. at 27, 45 U.S.L.W. at 4903.

C. Many Narrowly Drawn, Less Restrictive Alternatives Are Available To Guard Against Any Abuses That Might Result From Solicitation.

There is one legitimate justification for solicitation rules: to prevent overreaching and duress that can result when a potential client is in a situation where his or her judgment might be impaired. The exceptions to the general solicitation ban in fact suggest that this is one of the interests of underlying solicitation rules. DR 2-104 generally prohibits a lawyer from accepting employment by one to whom he or she has given unsolicited advice, but that does not apply to family, friends, and established clients, presumably because a lawyer will not take advantage of these classes of individuals. DR 2-104(A)(1). It is also common knowledge that solicitation occurs at country clubs and other civic and social settings, *see Bates v. State Bar of Arizona, supra,* slip op. at 19, 45 U.S.L.W. at 4901, but no one is especially troubled by this since the lawyer and the potential clients typically deal at arms length in such contexts, and the clients are considered able to fend for themselves.

Amici agree that the prevention of undue influence, duress, and overreaching are important consumer interests, but they should be dealt with directly through narrowly tailored rules rather than through overbroad prohibitions. It would be more prudent – and consistent with the First Amendment – to develop solicitation rules that are specifically directed at the problem of undue influence. Although First Amendment protections would continue to apply to solicitation, narrowly drawn rules would survive the First Amendment balancing test and could, therefore, be upheld as constitutional.

In contexts such as that of the *Smith* case, where an attorney approaches an individual on behalf of an organization

out of a sense of duty to assist that person in asserting his or her rights, the dangers nearly vanish. Potential clients in such contexts are more like friends and relatives who are presently exempted from the solicitation prohibition set out in DR 2-104. *See* DR 2-104(A)(1). Because of the strong identity of interest between the lawyer, the organization, and the potential client, only very minimal regulation of the transaction is necessary. This Court has also emphasized that identity of interest is a constitutionally significant factor in invalidating solicitation rules that might otherwise be upheld. *NAACP v. Button, supra,* 371 U.S. at 443. Moreover, because solicitation on behalf of an organization like the ACLU is not commercial in nature, full First Amendment protections apply.[20]

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[20] In *Bates*, the Court stated that the overbreadth doctrine applied weakly if at all to commercial speech and as a result, a plaintiff could not merely demonstrate that some protected speech was prohibited by the challenged regulation but had to show that his or her speech was itself protected as well. Slip op. at 29, 45 U.S.L.W. at 4903. In the *Smith* context, however, there is a pressing need to apply the overbreadth doctrine because the *in terrorem*, chilling effect that the overbreadth doctrine is intended to prevent is ominously present.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* 425 U.S. at 771-72, n.24, the Court suggested that the long standing First Amendment prohibition on prior restraints might also be inapplicable in commercial speech contexts. However, the need to revitalize the prior restraint doctrine in the solicitation context is apparent. Often speed in learning about one's legal rights is essential if meaningful redress is to be obtained. *See* EC 2-2. Moreover, from the consumer's point of view, solicitation prohibitions are prior restraints in the fullest meaning of the term. Because solicitation rules operate on parties over whom consumers have no control (members of the Bar), consumers cannot even risk violating those rules at their peril. Thus, they are completely at the mercy of the lawyers to whom solicitation rules apply.

In commercial contexts more traditionally associated with solicitation, such as the circumstances of the *Ohralik* case, the dangers of undue influence may be more pronounced. However, several alternatives which are less restrictive than a total prohibition on solicitation are available to guard against this danger. For example, lawyers could be required to confirm their employment contracts in writing within a specified period of time after the initial retention. This would allow newly obtained clients to reflect upon their initial employment decisions, to ask more questions, to seek other advice, or merely to have a change of heart. Such a confirmation requirement would avoid extended periods of ambiguity, such as the one month period during which appellant Ohralik believed himself to be representing Wanda but Wanda apparently believed that he had been discharged. Moreover, a confirmation requirement would place soliciting attorneys on notice that their employment contracts were subject to unilateral rescission so that they would not needlessly expend non-essential time on a case at its early stages. Another alternative is to prescribe a "cooling-off" period during which a solicited client has an absolute right to rescind the employment contract with no financial obligation. Again, the lawyer would be on notice not to provide non-essential legal services during this "cooling-off" period.

Soliciting attorneys could also be required to advise their clients at the time of the solicitation of their right to rescind their employment agreements if the clients became dissatisfied with their attorneys' representation. The *Ohralik* case suggests that once Carol and Wanda became dissatisfied, they may nevertheless have felt tied into their earlier agreements. An affirmative disclosure of the right to discharge counsel would eliminate this misimpression. After such a rescission, which could occur at any time, the attorney

would be compensated on a *quantum meruit* basis for the reasonable value of the services already rendered.

Finally, the Court in *Bates* emphasized that prohibitions on false, deceptive, and misleading advertising were proper. Slip op. at 31, 45 U.S.L.W. at 4904. Moreover, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* 748 U.S. at 771, the Court recognized that certain time, place, and manner restrictions could serve as valid restraints on commercial advertising. This suggests that restrictions on the settings in which solicitation can occur would be upheld if closely enough associated to the danger of undue influence. Consequently, a rebuttable presumption that solicitation at the scene of an accident or in a hospital involves undue influence might be sustainable since it shifts to the attorney the burden of justifying his or her actions. However, since many individuals would retain their independence and unimpaired judgment in such settings, an irrebuttable presumption probably could not withstand constitutional scrutiny.

It is, of course, not the duty of litigants or of this Court to draft acceptable rules for the Bar to use in regulating solicitation. Nevertheless, the suggested alternatives indicate that the beneficial flow of information that accompanies solicitation can be preserved while minimizing the dangers of undue influence. Consequently, those alternatives are preferable to the Bar's current prohibition of all solicitation. The organized bar has already tried extensive regulation of advertising and solicitation, and it has not proven to be in the consumers' best interest. Now it is time to experiment with minimal regulation in this area to see whether consumers will fare any better. By proscribing only those activities that are likely to cause some harm, the benefits of adequate information flow will

be fostered. If problems do arise, the legal profession can fashion remedies to deal with those demonstrated problems rather than with speculative, theoretical ones. Freer experimentation in this area is not only suggested by prudence but is compelled by the Constitution.[21]

III. THE CONDUCT OF EACH APPELLANT IS PROTECTED BY THE FIRST AMENDMENT.

As a result of this Court's ruling in *Bates*, it is not sufficient in the commercial speech context to demonstrate that a disciplinary rule is overbroad. An appellant must also demonstrate that his or her particular conduct is protected. Slip op. at 29, 45 U.S.L.W. at 4903. However, both appellants are able to make that showing in the present appeals.

As *amici* noted above at pages 32-33, appellant Smith's actions were not financially motivated, and she did not stand to benefit financially from those actions. Rather, she was attempting to advise a disadvantaged individual of her legal rights and to assist her in asserting those rights. Consequently, Ms. Smith's actions did not constitute commercial speech, and she is, therefore, entitled to the full protection of the First Amendment. Moreover, her actions fall well within the sphere of activities to which this

[21] Better reasoned approaches to solicitation are already beginning. On November 9, 1976, the Board of Governors of the District of Columbia Bar approved, and recommended that the District of Columbia Court of Appeals adopt, changes in Canon 2 that would permit the types of solicitation at issue in the present appeals. ~~Moreover, in response to *Bates*, the ABA drafted two proposed modifications to Canon 2. Although the more restrictive *Proposal A* was adopted, *Proposal B*, which would also allow the types of solicitation here at issue, is being circulated to all state bars along with *Proposal A*.~~

Court has consistently accorded First Amendment protections. Not only was Ms. Smith's freedom of speech at stake, but her right to associate with the ACLU, and to pursue their common objectives through litigation, was also involved. The facts of the *Smith* case closely parallel the facts in *NAACP v. Button, supra*, in which this Court upheld the First Amendment right of the NAACP to "solicit" plaintiffs for school desegregation suits after recognizing the same rights of expression and petition that are at issue here. *Button* and its progeny, *see* pages 28-29, above, control the *Smith* appeal and unambiguously establish that appellant Smith's activities are protected by the First Amendment.

Although appellant Ohralik's actions appear to comprise commercial speech, they are, nevertheless, protected by the First Amendment. Mr. Ohralik was not charged with fraud or misrepresentation so that he is not disqualified from First Amendment protection for either of those reasons. Moreover, the disciplinary tribunals made no findings of duress, overreaching, or undue influence, so that the rationale underlying solicitation rules does not cut off First Amendment protections either. While the record does show that appellant Ohralik's clients became dissatisfied with his representation, he was not charged with violation of any of the ethical provisions regulating the manner of client representation or the reasonableness of his fees. The Ohio Board of Commissioners on Grievances and Discipline instead chose to charge him with solicitation. Since appellant Ohralik was not found to have committed any of the evils to which properly drawn solicitation rules would be directed, his actions too are protected by the First Amendment.

CONCLUSION

The present ban on solicitation by attorneys unnecessarily deprives consumers of information about their legal rights and and the availability of attorneys to assert those rights. Because many less restrictive alternatives exist which can minimize any legitimate dangers, while preserving the beneficial flow of information to consumers, a total prohibition on all solicitation cannot withstand First Amendment scrutiny. Moreover, because the particular actions of the appellants who were charged with violating those rules are protected by the First Amendment, this Court should set aside the disciplinary orders of the State Supreme Courts below.

Respectfully submitted,

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